Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1971

No. .....

DAVID THOMAS MCBRIDE,

Petitioner

v.

COMMONWEALTH OF VIRGINIA,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

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IN THE

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OCTOBER TERM 1971

No. .....

DAVID THOMAS MCBRIDE,

Petitioner

v.

COMMONWEALTH OF VIRGINIA,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

The Petitioner prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Virginia, entered on March 13, 1972, denying the Petition for Writ of Error and affirming the order of conviction and sentencing entered by the Circuit Court of Bedford County, Virginia on March 30, 1971.

Opinion Below

The order of the Supreme Court of Virginia is not recorded. It is set forth in the Appendix infra, pages

Jurisdiction

The judgment of the Supreme Court of Virginia was entered on March 13, 1972. The jurisdiction of this court is invoked pursuant to 28 U.S.C. section 1257(3).

Questions Presented

1. Whether a magistrate may issue a warrant upon the hearsay of a named informant whose credibility is not vouched and whose interest in lying appears on the face of the affidavit?

2. Whether Virginia may constitutionally compel a criminal defendant to choose between having the benefit of a presentence report before sentencing and exercising his right to be tried by jury?

3. Whether a trial judge may keep the nature and specific content of questions propounded to the court by the jury during its deliberations from the defendant and his counsel?

Statute Involved

Virginia Code Section 53-278.1 provides as follows:

> Section 53-278.1. Investigations by probation officers in certain cases.—When a person is tried upon a felony charge for which a sentence of death or confinement for a period of over ten years may be imposed and pleads guilty, or upon a plea of not guilty is tried by the court without a jury as provided by law, and is adjudged guilty of such charge, the court may, or on the motion of the defendant shall, before fixing punishment or imposing sentence direct a probation officer of such court to thoroughly investigate

and report upon the history of the accused and any and all other relevant facts, to the end that the court may be fully advised as to the appropriate and just sentence to be imposed. The probation officer shall present his report in open court in the presence of the accused who shall be advised of the contents of the same and be given the right to cross examine the investigating officer as to any matter contained therein and to present any additional facts bearing on the matter which he may desire to present. The report of the investigating officer shall be filed as a part of the record in the case.

Statement of the Case

On November 11, 1970, State Trooper B. F. Chumney, an undercover police officer investigating drug violations, arranged to purchase a quantity of Lysergic Acid Diethylamide (LSD) with a subject named Buddy Wright. Chumney and Wright met two subjects, one named Maurice Elwood Clingempeel, Jr., and one named Lola Ann Applegate on November 11, 1970, and drove to a location in Bedford County. Clingempeel and Applegate asked Chumney and Wright to wait for them while they walked away. They told Chumney they were going to buy LSD from David McBride for the purpose of selling to Chumney.

Clingempeel and Applegate returned an hour to an hour and a half later, sold Chumney some tablets and said they had purchased them from McBride.

On November 13, 1970, Chumney again arranged to purchase LSD from Clingempeel and Applegate with the help of Buddy Wright. Again the four drove into Bedford County and stopped, this time near the place where they had rendezvoused on November 11, 1970. Chumney gave Clingempeel marked money to make the pur-

chase. Clingempeel and Applegate said they were leaving to purchase drugs from David McBride. They drove away and returned forty-five minutes later. Upon returning, and delivering the drugs to Trooper Chumney, Clingempeel and Applegate were arrested and Clingempeel described a transaction with David McBride mentioning a glass jar with pills and a journey taken by McBride to the outside of the house.

Trooper Chumney, on the basis of Clingempeel's statements, swore out an affidavit for warrants to arrest and search the premises of David McBride.

The warrants were executed in the early morning of November 14, 1970. A number of officers and Buddy Wright searched the home and the surrounding area. After some time had elapsed, Buddy Wright pointed out one gold tablet on the kitchen table. Shortly thereafter, a bag with dust was found in the kitchen, and sometime later, a jar with the marked money was found in the yard outside. The jar and the money were tested for fingerprints. McBride's prints did not appear.

At the pre-trial suppression hearing, defense counsel moved to quash the warrants for the arrest of David McBride and for the search of the place where he lived, and to suppress the evidence seized pursuant thereto, primarily because the warrants were issued on the basis of affidavits which receited only unsubstantiated hearsay. The motions were overruled.

At the trial of March 29-30, 1971, in a courtroom filled with school children, Clingempeel testified that he obtained LSD from David McBride on three occasions and that he purchased from him on the two nights in question. He testified also that on both November 11 and November 13 he had drunk extraordinary amounts of liquor, he had been using drugs since 1967 and that he was testifying in the hope of gaining leniency.

Lola Applegate testified that she had not seen any drugs change hands, and had never seen drugs in McBride's possession. She had waited outside while the alleged sales had taken place and saw nothing of them. She testified with the hope of leniency since she faced charges growing out of the sale to Chumney. She also testified that she had used LSD in tablets similar to those involved in the McBride case before meeting McBride in October of 1970.

Troopers Chumney, Deavers and Jackson testified as to various aspects of the search and indicated that one tablet was found on the kitchen table, pointed out by Buddy Wright, a baggie with dust was found near the kitchen table, by Investigator Deavers, and a jar with marked money was found outside by Trooper Jackson, under a bush.

Buddy Wright testified that he saw the tablet in the kitchen and that he had used LSD in similar tablets, bought from Clingempeel, since August of 1970.

Chemist, Paul Struther testified that the items responded positively to the qualitative test for LSD, that all the tablets could possibly have come from the same source, and that it was an unusual form of tablet.

The Defendant and his fiancee took the stand, denied that McBride had possessed or sold any of the items in question and testified that they had come to Virginia in mid-September or early October of 1970.

At the conclusion of the Commonwealth's case, defense counsel moved to strike the Commonwealth's evidence and preserved all previous motions. All motions were overruled.

At the conclusion of Defendant's case, defense counsel again moved to strike, preserving all previous motions. The motions were again denied.

The case was submitted to the jury. During the course of its deliberation, the jury submitted a number of questions to the judge. The judge would not disclose the nature or the contents of the questions to counsel. Defense counsel objected to the procedure.

The jury found the Defendant guilty on both counts, and without benefit of a presentence report, sentenced the Defendant to twenty-five years in confinement on each of the two charges.

Defense counsel moved the Court to set aside the verdict as being contrary to the law and the evidence and moved the Court for a new trial.

Motions were overruled and judgment was entered on the jury's verdict on March 30, 1970.

After March 30, 1970 an order was entered substituting counsel and motions were made with respect to sentence and a hearing requested for the purpose of exploring questions of sentence. No action was taken with respect to those motions and the Judgment Order became final.

The Petitioner then appealed to the Supreme Court of Virginia. His petition for Writ of Error was denied.

It is to review the decision of the Bedford County Circuit Court that Petitioner seeks a Writ of Certiorari.

How the Federal Questions Were Raised

The Petitioner raised his Fourth Amendment issue by way of motion to the Bedford County Circuit Court and in his Petition for Writ of Error to the Supreme Court of Virginia. The pre-sentence report issue was raised by a motion to suspend sentence after trial in the Circuit Court of Bedford County and in his Petition for Writ of Error

to the Supreme Court of Virginia. (Appendix pp 9a, 11a). The juror questions issue was raised by way of objection during the trial before the Circuit Court of Bedford County and in his Petition for Writ of Error to the Supreme Court of Virginia. (Appendix pp 7a, 8a, 11a).

REASONS FOR GRANTING THE WRIT

1. The Court should determine whether a magistrate may issue a warrant upon the hearsay of a named informant whose credibility is not vouched and whose interest in lying appears on the face of the affidavit.

Since 1964 when this Court handed down its landmark decision in *Aguilar v. State of Texas* 378 U.S. 108(1964), there has been substantial doubt among authorities and courts as well as to what statements are necessary to establish an informant's reliability to the end of establishing probable cause for the issuance of a warrant when the affiant's information is based entirely on heresay.

Since *Aguilar*, and especially since *Spinelli v. United States*, 393 U.S. 410 (1969), there has evolved a "two pronged test" for determining the existence of probable cause. First the affiant must divulge something establishing the informant's credibility as a person. That is the first "prong". Next, the informant must be able to show that he has personal knowledge of a substantial character to avoid the risk of rumor mongering. This is the second "prong".

In *United States v. Harris*, 403 U.S. 587(1971), however, this Court credited an affidavit for several reasons which seem to leave substantial question as to the viability of the "two pronged test" of *Aguilar* and *Spinelli*.

The present case, in which a prison sentence of fifty

years was meted out by a jury, presents squarely several important questions concerning the effect of *Harris* on the two pronged test.

a. — Under *Spinelli*

It will appear at the outset that the affidavit in question would fail the *Spinelli* test since it does not set forth anything vaguely approaching an affirmance of the reliability of the co-informants Applegate and Clingempeel. It is interesting to note that Federal Courts have taken judicial note of the fact that individuals in Clingempeel's and Applegates positions are "frequently 'monstrous liars' " *Gilbert v. United States*, 366 F.2d 923, 931 n.9 (9th Cir. 1966).

Certainly the affidavit passes the "second prong". There is ample detail to show it is not casual rumor. But none of the detail helps the affidavit pass the "affirmance of credibility" test of *Spinelli*. Before *Harris*, then, the affidavit would be an abysmal failure.

b. — After *Harris*

Although *Harris* has added a new wrinkle, it is not until the very end of the majority opinion that it appears. By the reasoning of the first part of the *Harris* opinion, the affidavit in question would fail again. In *Harris*, the affiant stated that he knew of the defendant's prior illegal activities. Nothing of the sort is present in the case at bar.

Further, the affiant stated that he knew the informant to be a "prudent person". Once again, there is no such allegation in this case. The Court indicated it would have upheld the *Harris* affidavit for those reasons alone.

In the third part of *Harris*, however, the Court adds a complicating factor. The Court in *Harris* found that the informant's statement is against his own interest since

he had admitted to illegal dealing over a number of years. Since the statement is against interest, the hearsay is entitled to more weight.

While the "statement against interest" rationale may be appropriate and reasonable in *Harris*, it should be apparent to the Court that it is subject to abuse unless limitations are placed upon it. The Courts may be tempted to credit any informant's hearsay arguing that it is always aginst the informant's interest to cooperate with the police. The case at bar provides a perfect example of an abuse of the "statement against interest" reasoning, for it was for that reason that the affidavit was upheld by the trial court.

Here, it is clear that all of Clingempeel and Applegate's statements are made for the sole purpose of providing themselves with "an out" if they are caught distributing illegal drugs.

It must be remembered that Cingempeel and Applegate thought they were dealing with Chumney the buyer, not Chumney the agent. If they were wary drug dealers, and it seems they were, they would say they were getting their supplies from McBride in order to take the heat off themselves if ever one of their buyers proved to be an undercover agent. Further, they were not confessing to deeds with which Chumney was not familiar, as was the case in *Harris*. To say they got their drugs from McBride meant nothing since by handing the drugs over to Chumney, they had already stuck their heads fully into the noose without ever making a statement. Saying they got their illegal drugs from McBride did nothing to make them look worse. It made them look like middle men, doing business for the "evil big man". Such statements are far from statements against interest. They are toward interests since they make it easy for Applegate and Clingempeel to avoid serious trouble if they are caught.

It cannot have been this Court's intention to allow such

statements to be given extra weight. If anything, these statements are entitled to less weight and the affiant should have borne a greater burden in establishing their credibility. Any neutral and detached magistrate should ask immediately why Applegate and Clingempeel were to be believed.

This Court should grant certiorari to explore this very important issue with care.

2. This Court should determine whether Virginia may constitutionally compel a criminal defendant to choose between the benefit of a pre-sentence report before sentencing or exercising his right to be tried by jury.

By statute, (Section 53-278.1 of the Code of Virginia 1950 as amended) Virginia permits the Court to consider a pre-sentence report before passing sentence if a defendant has waived his right to a trial by jury and he is tried by the Court. If he is tried by a jury, the jury determines guilt and sentencing at the same time, as no provision for a presentence report exists.

Plainly there is an invidious discrimination at work, either denying a defendant the advantage of a pre-sentence report, as here, or making the defendant waive his Sixth Amendment right to trial by jury.

This is precisely the kind of "jury election" dilemma this Court found repugnant to the Constitution in *United States v. Jackson*, 390 U.S. 570(1968). There a defendant could receive a sentence of death if he chose to be tried by jury and a maximum term of life in prison if he waived his Sixth Amendment right.

In responding to this question in the Supreme Court of Virginia, the Commonwealth argued that the issue was

raised for the first time on appeal. By moving to suspend a portion of the sentence, the defendant, in effect, requested the advantage of a presentence report, which motion the Court implicitly denied by entering its Final Judgment Order without further consideration. The issue was properly before the Supreme Court of Virginia which denied Writ of Error.

3. This Court should determine whether a trial judge may keep the nature and specific content of questions propounded to the Court by the jury during its deliberations from defendant and his counsel.

While the jury was deliberating, certain questions were written down and propounded to the Court by the jurors. The Court refused to disclose the questions or their nature to either counsel. The questions, as written, were made a part of the record, but were never shown to counsel before the verdict was rendered.

The questions as it turned out, were vital ones, and may in fact have called for the replaying of critical testimony. In Virginia, the defendant is entitled to have the jury hear testimony repeated by the reporter. *Jackson v. Commonwealth* 19 Gratt (60 Va.) 656 (1870).

Lower federal courts have held that where jurors' questions are essential to the case, the failure to answer them satisfactorily is a violation of Due Process of Law. *United States v. Jackson* 257 F.2d 41 (3rd Cir. 1958); *United States v. Fiorito*, 300 F.2d 424(7th Cir. 1962).

But here, the abuse goes far beyond the mere failure to have questions answered. Here the trial judge grossly abused his discretion by failing to reveal either the nature or the contents of the question to defendant or his counsel.

In this way, the defendant was deprived of the oppor-

tunity to present to the Court his views on whether the questions should be answered and whether the Court had authority to do so. The substance of the harm is the cloak of secrecy the Court has appeared to draw about its proceedings.

This is a kind of abuse too specific to have been passed on before, but it is that kind of abuse so inherently offensive to our notions of fairness and our abhorence of secrecy in criminal matters, that it falls within that category of violations of Due Process of Law outlined so articulately by Mr. Justice Frankfurter in *Rochin v. California*, 342 U.S. 165(1952).

Once again, the Commonwealth, in arguing against the granting of a Writ of Error, asserted that objection had not properly been made before the Circuit Court of Bedford County The record clearly reflects that trial counsel for Defendant expressed his objection to the procedure, and in fact the judge treated counsel's response as an objection by specifically overruling it (Trial Transcript Appendix page 7a, 8a).

CONCLUSION

For the reasons set forth above the Petition for Certiorari should be granted.

Respectively submitted,

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Attorneys for Petitioner

MAILING CERTIFICATE

I hereby certify that on the 9th day of June, 1972 I mailed three true copies of the foregoing Petition for Writ of Certiorari to Harry W. Garrett, Commonwealth's Attorney for Bedford County, Bedford County Circuit Courthouse, Bedford, Virginia 24523 and three copies to the Honorable Andrew P. Miller, Attorney General of Virginia, Supreme Court Building, Richmond, Virginia.

APPENDIX

Order of the Supreme Court of Virginia denying Petition for Writ of Error dated March 13, 1972

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Monday the 13th day of March, 1972.

The petition of David Thomas McBride for writs of error and supersedeas to judgments rendered by the Circuit Court of Bedford County on the 30th day of March, 1972, in prosecutions by the Commonwealth against the said petitioner for felonies (Indictments Nos. 1 and 2 — Distribution of a Controlled Drug), having been maturely considered and transcripts of the records of the judgments aforesaid seen and inspected, the court being of opinion that there is no reversible error in the judgments complained of, doth reject said petition and refuse said writ of error and supersedeas in each of these cases, the effect of which is to affirm the judgments of the said circuit court.

A Copy,

Teste:

Howard G. Turner, Clerk

By: Allen L. Lucy

Deputy Clerk

Affidavit for Search Warrant obtained in Bedford County, Virginia on November 14, 1970

On the 11th of November 1970 during the night time hours, pursuant to earlier conversations and arrangements concerning the purchase of Lysergic ecid diethylamide, made between Trooper B. F. Chumney (working undercover) and Buddy Wright with an individual known as Maurice Elwood Clingempeel, Jr. — Said Trooper Chumney and Buddy Wright, accompanied the said Maurice Elwood Clingempeel, Jr. and his female companion known as Lola Ann Applegate to a location designated by the said Clingempeel — said location being on route # 735 approximately 3/10 mile South of Body Camp in Bedford County, Virginia. At this location Clingempeel and Lola Applegate left Trooper B. F. Chumney and Buddy Wright for the stated purpose of walking to a nearby location to purchase the Lysergic acid diethylamide from an individual known as David McBride. Trooper Chumney and Buddy Wright were told by Clingempeel that they could not accompany he and Lola Applegate while they got the Lysergic acid diethylamide from David McBride. Clingempeel and Lola were gone approximately one to one and one half hours. Upon their return Clingempeel had the Lysergic acid diethylamide in his possession, which he sold to Trooper Chumney and Buddy Wright for $100.00. The $100.00 paid to Clingempeel consisted of five twenty dollar bills of U.S. currency bearing the following serial numbers;

B 59256911 A
E 80099558 A
E 89069045 A
E 87634038 A
E 18897550 B

Before departing, Clingempeel stated that the L.S.D. (Lysergic acid diethylamide) was to be gotten from David

McBride, and upon his return he stated that he had gotten the L.S.D. from McBride.

November 13, 1970 at approximately 11:30 P.M., Trooper Chumney contacted Clingempeel and arranged for the purchase of 100 tablets of L.S.D. (Lysergic acid diethylamide) for $350.00. At the direction of Clingempeel, Chumney and Buddy Wright followed the automobile of Clingempeel and Lola Applegate into the Body Camp area of Bedford County. They stopped at the intersection of routes # 735 and 24 (which location is approximately 3/10 mile from the site where Chumney and Wright purchased the L.S.D. from Clingempeel and Lola on the 11th day of November)

At this point Clingempeel asked Chumney and Wright for $360.00. This sum was given to him in the following denominations of U.S. currency bearing the following serial numbers;

$50 — G 06137243A	$20 — E 22670627B
$50 — B 00633509*	$20 — B 61347842A
$20 — E 87862874A	$20 — F 29933010A
$10 — E 89722282A	$20 — B 09197285B
$10 — E 82985397A	$20 — J 24822132A
$10 — E 86401738A	$20 —E28080772A
$20 — F 51418064A	$20 — E 18416528A
$20 — B 94065788A	$20 — E 85794769A

Clingempeel and Lola took the money and left for the stated purpose of purchasing the L.S.D. from David McBride. They were gone approximately 45 minutes and returned with the L.S.D., which they delivered to Chumney and Wright. At this point Clingempeel and Lola were arrested, and subsequent search of Lola Applegate resulted in the recovery of two fifty dollar bills bearing the serial numbers B00633509* and G06137243A.

On the occasion of November 11, 1970, Clingempeel and

Lola Applegate left Chumney and Wright to wait in the automobile while they went on foot to get the L.S.D. On the occasion of November 13, 1970, Clingempeel and Lola left Chumney and Wright to wait in their automobile, while they used their own vehicle to go and get the L.S.D. After being fully advised of his constitutional rights and indicating that he understood the same, Clingempeel stated that he took the $360 and went to an unpainted gray asbestos sided two story house with a front porch, located approximately one mile South of intersection of routes 24 and 735, where he knew David McBride to be. This was the same location and building to which he had gone to get the L.S.D. from David McBride on the 11th day of November 1970.

Clingempeel laid $260 on a table, keeping $100.00 for himself which he gave to Lola Applegate. He told McBride what he wanted. McBride left the house and was gone approximately five minutes. He returned, carrying a small glass jar of some type in which he had the L.S.D. During this time Lola remained in the car. McBride gave the L.S.D. to Clingempeel, and Clingempeel left and he and Lola returned to the spot where they had left Chumney and Wright. Clingempeel then gave the L.S.D. to Tpr. Chumney.

Chumney observed the aforementioned two story dwelling, located on the West side of route # 735 approximately one mile South of the intersection of 735 and 24. Chumney saw what appeared to be a green Chevrolet truck with a camper body parked near the house, as well as a number of outbuildings surrounding the back and sides of the dwelling.

The foregoing facts set forth on these two typewritten pages are true and correct to the best of my knowledge and belief, and are attached to and made a part of my affidavit for search warrant.

B. F. Chumney, Tpr.

Affidavit for Search Warrant

State of Virginia County of Bedford, to-wit:

Before me, Paul W. L. Leftwich (Notary Public) this day came Trooper B. F. Chumney, who, after being duly sworn, made oath as follows:

(1) The offense in relation to which search is to be made is substantially as follows: The possession and distribution of dangerous drugs and narcotics in violation of 54-524.101 Code of Virginia.

(2) The material facts constituting probable cause for issuance of the warrant are: See attached statement consisting of two typewritten pges signed and initialed by Trooper B. F. Chumney.

(3) The articles to be searched for under the warrant are: Dangerous drugs and narcotics and marked money used in drug purchases on November 11 and 14, 1970. See attached sheet for serial numbers of marked money.

(4) The house, place vehicle, or baggage to be searched is described as follows: A two story, unpainted, asbestos sided house located on the West side of route 735 approximately one mile South of the intersection of 735 and 24, as well as all out-buildings and the surrounding premises — also a green Chevrolet truck with a camper body and any other vehicles found on the premises.

B. F. Chumney, Tpr.

Subscribed and sworn to before me this 14th date of November, 1970.

Paul W. L. Leftwich (Seal
(Notary Public) exp. date 4-19-74

A copy teste: H. P. Scott, Clerk

Questions propounded by jurors during their deliberations in Bedford County Circuit Court March 29-30, 1971

Exhibit "X" WWS.

Mr. Chumbie. Did Clingpeel every say he was buying from McBride before arrest 11-14-70.

How did they (Police) know where McBride lived.

At anytime did McBride or wife say anything about knowing about drugs or reaction to search.

Did State Police watch McBridge House after arrest (Clingpeel) before search McBride house.

Transcript of Trial *Commonwealth of Virginia v. David Thomas McBride* in Circuit Court of Bedford County Virginia March 29-30, 1971 pages 225-227

225.

JUDGE:

I just came up with thirty minutes, I would think it would be enough time. It's a long time.

Mr. Garrett and Mr. Trabue, the Jury has directed certain question to me about the case in writing. I have not revealed the content of this writing to either counsel, either to you or to Mr. Grabue, because, I feel to do so, would be improper in that it would show you what phases of the case are bothering the Jury. I will say that the questions that they have asked are evidentiary questions, they're not questions of law.

I recall that yesterday before we started the case, I told this Jury panel that if they had questions, the proper way to raise them would

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be to raise their hand at the proper time and direct the question to me and if the question were one that could be answered, I would then direct the question to the witness. That would be the way to handle it. No questions were asked, I did not see anybody raise their hand. Now, both sides have rested the case in chief, witnesses have gone home and under the laws of the State of Virginia, I cannot answer nor would I attempt to answer these questions for the Jury. I think for me to do so could very well be prejudicial error, because it would, — because of two reasons really, number one: I might answer the questions wrong; number two: Even if I answered them it would lend undue emphasis to these particular points in the case. So, for the record, I'm merely stating what has occurred and I'm going to call the Jury out and tell them

that they will have to resolve these questions from what they have heard and from any help that counsel might give them on closing argument and from the instructions.

Now, are there any objections or exceptions to the action of Court on this point?

COM. ATTY:

None on the part of the Commonwealth, your Honor.

JUDGE:

I will file this particular note from the Jury with the papers in the case so that if anybody wants to make some point of it later on appeal, it will all — all the record will be there, but I'm not going to attempt to answer the questions.

TRABUE:

Your Honor, may I make a comment on behalf of the defendant?

Not knowing what the questions are, I don't know frankly exactly

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whether to object or not. The only point that I would make, if the Court has read the answers — questions, if the answers to those questions would be favorable to the defendant, then perhaps it would be to the defendant's best interest that I be permitted to read those questions.

JUDGE:

Well, I really — I have looked at the questions and I really cannot honestly say whether the questions are — would benefit the defense or the Commonwealth. But in any event, your motion is overruled, Mr. Trabue.

Motion to suspend sentence filed with Circuit Court of Bedford County April 16, 1971.

VIRGINIA
IN THE CIRCUIT COURT FOR THE COUNTY OF BEDFORD
COMMONWEALTH OF VIRGINIA
MOTION TO SUSPEND SENTENCE

v.

DAVID THOMAS MCBRIDE

Now comes your Petitioner and moves this Honorable Court as follows:

1) Your Petitioner stands convicted before the Circuit Court of Bedford County of two counts of sale of LSD and has been sentenced to 50 years in prison.

2) Said judgment was entered on March 31, 1971.

3) Your Petitioner is of good character and a credit to his Community and deserving of consideration regarding suspension of sentence.

4) Your Petitioner has witnesses as to his character who would testify in Court to show his merit and worth.

WHEREFORE your Petitioner prays that this Honorable Court amend its final order of sentence to take a Motion to suspend sentence under advisement and that Petitioner be permitted to introduce evidence of his good character in pursuance of his Motion to suspend sentence.

David Thomas McBride
By Counsel

F. Guthrie Gordon, III
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1111 West Main Street
Charlottesville, Virginia 22903

Notice of Appeal and Assignments of Error filed with the Circuit Court of Bedford County on May 28, 1971.

VIRGINIA
IN THE CIRCUIT COURT OF BEDFORD COUNTY
COMMONWEALTH OF VIRGINIA

NOTICE OF APPEAL AND
ASSIGNMENTS OF ERROR

v.

DAVID THOMAS MCBRIDE

TO: Mr. H. Page Scott, Clerk
TO: Circuit Court of Bedford County
TO: Circuit Court Building
TO: Bedford, Virginia

NOTICE OF APPEAL

Notice is hereby given that David Thomas McBride will apply for a writ of Error from the final Order in the above-styled case entered in the Circuit Court of Bedford County in Bedford, Virginia, March 31, 1971 convicting him of two charges of sale of LSD, and sentencing him to confinement in the penitentiary for 50 years.

ASSIGNMENTS OF ERROR

The above named defendant, now standing convicted, asserts by his counsel as his Assignments of Errors, the following:

1. It was error for the Court to overrule the motion of defendant to suppress physical evidence seized in a search of November 14, 1970 as both the search warrants and

arrest warrents were issued without probable cause and based upon unreliable hearsay, and hence in violation of defendant's rights under the Virginia and United States Constitutions.

13. It was error for the Court to deny the Defendant a pre-sentence report, he having forfeited such by electing to be tried by a jury, such forfeiture constituting a denial of equal protection of the laws as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

14. It was error for the Court to refuse to reveal to Defendant the nature of certain questions propounded to the Court by the jury.

DAVID THOMAS MCBRIDE
By Counsel

F. Guthrie Gordon, III
1111 West Main Street
Charlottesville, Virginia

MAILING CERTIFICATE

I hereby certify that I mailed a true copy of the foregoing Notice of Appeal and Assignments of Error to Harry W. Garrett, Esq., Commonwealth Attorney of Bedford County at his office in the Bedford County Circuit Courthouse, Bedford, Virginia, on the 28th day of May, 1971.

F. Guthrie Gordon, III

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Supreme Court of the United States

October Term

No. 71-1613

DAVID THOMAS McBRIDE,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The respondent, the Commonwealth of Virginia, respectfully submits the following brief in opposition to the granting of a writ of certiorari in the above matter. The parties will be referred to herein by their respective positions in the trial court, i.e., defendant and Commonwealth.

QUESTIONS PRESENTED

The Commonwealth would restate the questions presented as set forth in defendant's brief, as follows, in order to remove from the issues statements of arguable facts:

1. Were the arrest and search warrants which resulted in defendant's conviction issued upon an adequate showing of probable cause?

2. Is Virginia's Unitary Trial system unconstitutional?

3. Did the trial judge abuse or deny the defendant's constitutional right to due process by refusing to disclose and/or answer questions propounded by the jury?

STATEMENT OF THE CASE

Defendant's statement of the case is substantially correct and is hereby adopted. The Commonwealth would take issue with defendant's statement that objection was made to the procedure of the trial court in not disclosing to the parties the content of questions asked by the jury. The Appendix to defendant's brief sets out the portions of the transcript relating to this matter, and show that no objection was actually made. It should also be pointed out that this incident occurred prior to closing arguments of both parties and prior to the giving of the court's instructions.

ARGUMENT

1. Were The Arrest And Search Warrants Which Resulted In Defendant's Conviction Issued Upon An Adequate Showing Of Probable Cause?

The warrants in question were issued by an impartial magistrate at the request of a police officer, State Trooper, B. F. Chumney, pursuant to his work as an undercover officer investigating drug violations. In support of his application for the issuance of the warrants he presented the magistrate a sworn affidavit setting forth certain facts. The crucial question before the Court is whether those facts

were sufficient to establish probable cause for the issuance of the warrants, therefore those facts should be examined. (Said affidavit is fully set out in the Appendix to defendant's brief.)

The affidavit showed that Officer Chumney had arranged to purchase LSD through an individual named Clingenpeel. After meeting Clingenpeel and driving to a certain location, Clingenpeel advised Chumney that he was going to purchase the LSD from one David McBride. Clingenpeel subsequently returned with some LSD, sold it to Chumney and told him that it had been obtained from McBride. Substantially the same procedure was used two days later for another purchase. After Clingenpeel returned the second time, he and his companion, Lola Applegate, were arrested, and he then told Chumney again that he had purchased the LSD from McBride and described more fully the transaction.

On both occasions the informant, Clingenpeel, told the undercover officer, not knowing he was a policeman, that he was going to purchase the drugs from McBride, and on both occasions he told the officer he had in fact obtained the drugs from McBride. The information the informant gave after arrest, and after being confronted with the fact that Chumney was a police officer, did not materially add to the information the officer already had, except as to the location and description of McBride's house. The informant was clearly named in the affidavit, so this is not the case of an unnamed informant.

As pointed out by the defendant in his brief, the leading cases in this area are *Aguilar* v. *Texas*, 378 U.S. 108, 12 L.Ed.2d 723, 84 S.Ct. 1509 (1964); *Spinelli* v. *United States*, 393 U.S. 410, 21 L.Ed.2d 637, 89 S.Ct. 584 (1969); and *United States* v. *Harris*, 403 U.S. 573, 29 L.Ed.2d 723,

91 S.Ct. 2075 (1971). *Aguilar* established the so-called "two pronged" test to determine whether the affidavit for issuance of the warrant is sufficient. First the affidavit must set forth the underlying circumstances to allow the magistrate to determine probable cause for believing that the drugs are where the informer says they are. Secondly, the affidavit must set forth the underlying circumstances or otherwise give facts sufficient for the magistrate to determine the credibility of the informant or the reliability of his information.

There is no question in this case, and it is so admitted by the defendant in his brief, that the affidavit in question meets the first test, that is it sets forth sufficient facts for supplying probable cause for believing that the drugs were in McBride's house, so long as the informant's statements are credible. The only question left, and the one addressed by defendant's brief, is whether the informer Clingenpeel could be found sufficiently credible or whether reliability can properly be attributed to his information.

Initially, this is obviously not a situation where the information came from an unnamed informer for whom no reasons were given to support his reliability other than the affiant's personal belief. Therefore this is not the situation presented in either *Aguilar* or *Spinelli* and neither of those cases is directly controlling. In the instant case, the affidavit went much farther, and was based upon the informer's own observations of and participation in the criminal conduct. As the Court pointed out in *Spinelli,* it is important to know whether the informer came by his information directly or indirectly.

> "The tip does not contain a sufficient statement of the underlying circumstances from which the informer concluded that Spinelli was running a bookmaking

operation. We are not told how the FBI's source received his information—it is not alleged that the informant personally observed Spinelli at work or that he had ever placed a bet with him. Moreover, if the informant came by the information indirectly, he did not explain why his sources were reliable. . . . In the absence of a statement detailing the manner in which the information was gathered, it is especially important that the tip describe the accused's criminal activities in sufficient detail that the magistrate may know that he is relying on something more substantial than a casual rumor circulating in the underworld or an accusation based merely on an individual's general reputation." 393 U.S. 410, 416.

The information in the instant case met all of these objections set out in *Spinelli;* the informer was named and identified, he participated in the actual purchase of drugs from the defendant, and therefore was not basing his tip on rumor, reputation or hearsay, but on personal, first hand observation and experience. His reliability was established because he told the officer who he was going to buy the drugs from even before he bought them, as well as afterwards, and he described in detail the place where the sale took place and the circumstances surrounding the transaction. All of this information was included in the affidavit, and it is submitted by the Commonwealth that this was more than substantial information from which to justify the reliability of the informer and his information. The detail provided in the instant case is more in keeping with that accepted in *Draper* v. *United States,* 358 U.S. 307, 3 L.Ed. 2d 327, 79 S.Ct. 329 (1959), and which the Court pointed out in *Spinelli* was a "suitable benchmark."

Furthermore, in the instant case you have the additional factor approved and accepted in *Harris, supra,* that the

informer was making these statements against his own interests. And contrary to the assertion of the defendant, the inclusion in *Harris* of the factor of admission against interest was not a casual afterthought of the Court, nor merely an alternate ground for approval of the affidavit. The reasoning of the Court for accepting such statements is quite sound:

> "Common sense in the important daily affairs of life would induce a prudent and disinterested observer to credit these statements. People do not lightly admit a crime and place critical evidence in the hands of the police in the form of their own admissions. Admissions of crime, like admissions against proprietary interests, carry their own indicia of credibility—sufficient at least to support a finding of probable cause to search. That the informant may be paid or promised a 'break' does not eliminate the residual risk and opprobrium of having admitted criminal conduct. . ."

In the instant case, the defendant attempts to confer all sorts of devious and tricky motives on the informant in order to avoid the effect of *Harris*. He says that the informer's statements were made solely to provide him with "an out"; that he was trying to take the heat off by placing the blame on someone else; and that he was suspicious that Chumney might be a police officer and was therefore covering up. None of these bold assertions by the defendant have even the remotest basis in fact.

When the informer first told Chumney that he was buying from McBride, he didn't know Chumney was a police officer. He could not possibly have been trying to pass the blame to someone else. He was still guilty of illegal distribution of drugs whether he bought them from McBride or anyone else. Further, there is no evidence now, and certainly was none in the affidavit, or before the magistrate, that the in-

former continued to give information after his arrest in exchange for any promise of leniency or anything else. *Harris* disposes of that argument anyway, even if there was such evidence.

The defendant thinks nothing of making all sorts of inferences which the magistrate supposedly could have made to doubt the credibility of the informer, without any supporting evidence; yet will not allow the magistrate to make reasonable and probable conclusions from the full information that is before him. The Commonwealth submits that the affidavit in the instant case did overcome the objections of *Aguilar* and *Spinelli*, and met the conditions as well of *Draper*, *Harris* and *Jones* v. *United States*, 362 U.S. 275, 4 L.Ed.2d 697, 80 S.Ct. 725 (1960).

2. Is Virginia's Unitary Trial System Unconstitutional?

This unitary system, whereby the jury trying a case, after the defendant has elected to be tried by a jury, decides whether the accused is guilty and also determines the punishment, has been repeatedly upheld against this sort of attack by the Virginia Supreme Court. *Johnson* v. *Commonwealth*, 208 Va. 481, 158 S.E.2d 725 (1968); *Bloodgood* v. *Commonwealth*, 212 Va. 255, 183 S.E.2d 734 (1971); *Brown* v. *Commonwealth*, 212 Va. 515, 184 S.E.2d 786 (1971).

More importantly, such a unitary verdict system has also been upheld recently by this Court. *McGautha* v. *California*, *Crampton* v. *Ohio*, 402 U.S. 183, 28 L.Ed.2d 711, 91 S.Ct. 1454 (1971). See also *Spencer* v. *Texas*, 385 U.S. 554, 17 L.Ed.2d 606, 87 S.Ct. 648 (1967).

The defendant cites no reasons why these decisions should now be overturned. This is not the type of dilemma encountered in *United States* v. *Jackson*, 390 U.S. 570, 20

L.Ed.2d 138, 88 S.Ct. 1209 (1968), because in the instant case the maximum possible punishment was the same in either case, jury trial or judge trial. In addition, the issue never was presented to the trial court, since a pre-sentence report was not requested.

3. Did The Trial Judge Abuse Or Deny The Defendant's Constitutional Right To Due Process By Refusing To Disclose And/Or Answer Questions Propounded By The Jury?

The defendant's trial lasted two days. After reconvening for the second day the trial judge and the parties considered instructions while the jury remained recessed. When the jury was called back in for the closing arguments and the giving of instructions, the trial judge was given a piece of paper containing some written questions which the jury wanted to be answered. This was prior to the jury retiring to deliberate, but after all the evidence had been given and the witnesses excused. (The questions propounded and the record of the proceeding relating thereto are set out in the Appendix to defendant's brief.)

The trial judge, after reading the questions, then advised the parties that he had received the questions, and because of the nature of them was not going to attempt to answer them. Further, he stated that he would not disclose the contents to the parties because it would show what phases of the case were bothering the jury. This was obviously meant as a reference to the fact that counsel had yet to make their closing arguments to the jury.

It should be pointed out at the outset that no proper objection was made to this procedure by the defendant. Rule 5:7 (formerly Rule 1:8) of the Rules of the Supreme Court of Virginia, reads as follows:

> "This Court will not notice any objection requiring a ruling of the trial court unless the ground of objection was stated with reasonable certainty at the time of the ruling, except for good cause shown or to enable this Court to attain the ends of justice. . . ."

This rule has been interpreted to require that the trial judge be informed of the precise points of objection in the minds of counsel so that he may rule intelligently, thereby avoiding delay and the expense incident to appeals, reversals and new trials upon grounds of objection which might have been obviated or corrected in the trial court. *Reil* v. *Commonwealth,* 210 Va. 369, 171 S.E.2d 162 (1969); *Williamson* v. *Commonwealth,* 211 Va. 57, 175 S.E.2d 285 (1970). An objection to a ruling of the trial court must be made and an exception taken at the time the occasion arises, otherwise the objection is waived. *Witt* v. *Mernicks,* 210 Va. 70, 168 S.E.2d 517 (1969); *Russo* v. *Commonwealth,* 207 Va. 251, 148 S.E.2d 820 (1966); *Callards* v. *Commonwealth,* 208 Va. 340, 157 S.E.2d 198 (1967). This rule has even been applied to the failure of a defendant to object to the admission of evidence on the grounds of invalidity of a search warrant. *Manley* v. *Commonwealth,* 211 Va. 146, 176 S.E.2d 309 (1970).

Therefore this issue was never properly presented to the trial court and never properly before the Virginia Supreme Court, and could not have been considered by the Virginia Supreme Court, even though defendant attempted to raise it in his petition for writ of error, and even though the summary denial of said petition by the Virginia Supreme Court did not state any grounds for such denial. It should also be noted that this was cited as a defense in the Commonwealth's brief in opposition to defendant's petition for writ of error. See also *People* v. *Nelson,* 29 Mich. App. 251, 185 N.W.2d 183.

Under *Parker* v. *North Carolina,* 397 U.S. 790, 25 L.Ed.2d 785, 90 S.Ct. 1458 (1970) this Court cannot review a matter which was not reviewable by the state supreme court because it was not properly raised at the time of trial.

Without conceding the points raised above, the Commonwealth contends that this issue lacks any merit on which to reverse defendant's conviction. No cases have been found which raise this exact issue, however it has been consistently held that the question of whether a jury may be given information on what a witness had testified to is a matter resting in the discretion of the trial court. *United States* v. *DePalma,* 414 F.2d 394 (9th Cir., 1969); *Gregory* v. *United States,* 365 F.2d 203 (8th Cir., 1966); *Pinckney* v. *United States,* 352 F.2d 69 (5th Cir., 1965); *Tyler* v. *United States,* 361 F.2d 862 (10th Cir., 1966); *United States* v. *Jackson,* 257 F.2d 41 (10th Cir., 1958); *United States* v. *Carminati,* 247 F.2d 640 (2nd Cir., 1957); *Henry* v. *United States,* 204 F.2d 817 (6th Cir., 1953); *United States* v. *Rosenberg,* 195 F.2d 583 (2nd Cir., 1952), cert. den. 344 U.S. 838, 97 L.Ed. 652, 73 S.Ct. 20, reh. den. 344 U.S. 889, 97 L.Ed. 687, 73 S.Ct. 134, reh. den. 347 U.S. 1021, 98 L.Ed. 1142, 74 S.Ct. 860; *State* v. *Vaughn,* 200 Ore. 275, 265 P.2d 249 (1954); *State* v. *Richter,* 21 N.J. 421, 122 A.2d 502, cert. den. 351 U.S. 975, 100 L.Ed. 1492, 76 S.Ct. 1039.

Clearly, the trial judge in the instant case did not abuse his discretion in not revealing the questions to the parties prior to their closing arguments. To do so would have allowed counsel to know what matters were considered important by the jurors and to zero in on those points in their closing argument. This could have easily rendered an unfair advantage to one side or the other. And the defendant

never made any further request to have the questions revealed and/or answered after the closing arguments were completed and before the jury retired to deliberate.

Defendant asserts that he had a right to have the questions answered, citing *Jackson* v. *Commonwealth,* 19 Gratt (60 Va.) 656 (1870). A close reading of that case shows that no such holding is contained therein, nor did the court consider that question, but merely stated as a matter of fact that the trial court had answered questions of the jury. Although there are numerous cases holding both ways (see Annotation in 50 A.L.R.2d 176), there have been any number of cases upholding a trial court's decision not to answer such questions propounded by the jury. *United States* v. *Rosenberg, supra; United States* v. *DePalma, supra; Henry* v. *United States,* 204 F.2d 817 (6th Cir., 1953); *People* v. *Nelson, supra; State* v. *Richter, supra; State* v. *Close,* 106 N.J.L. 321, 148 A. 764 (1930); *Small* v. *Wegner,* 267 S.W.2d 26 (Mo., 1954), *Compton* v. *State,* 179 Ga. 560, 176 S.E. 764 (1934).

Defendant has not shown how he was prejudiced or harmed in any way by the action of the trial court, nor has he shown how this was a denial of due process, except for his self-serving statement that it was. A close look at the questions will show that to answer them would in fact have highlighted certain evidence which helped to prove that defendant was guilty. Therefore to answer the questions would have done more harm than good to the defendant.

CONCLUSION

For the reasons set out herein, it is submitted that no error was committed by the trial court or the Virginia Supreme Court, and the petition for writ of certiorari should be denied.

Respectfully submitted,

ANDREW P. MILLER
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CERTIFICATE OF SERVICE

I hereby certify that on or before the 6th of October, 1972, I mailed three copies of this brief to F. Guthrie Gordon, III, Lowe & Gordon, 1111 West Main Street, Charlottesville, Virginia 22903 and John C. Lowe, Lowe & Gordon, 1111 West Main Street, Charlottesville, Virginia 22903, counsel for petitioner.

GILBERT W. HAITH
Assistant Attorney General